No. 17-532

In the Supreme Court of the United States

CLAYVIN HERRERA, PETITIONER

v.

STATE OF WYOMING

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF WYOMING, SHERIDAN COUNTY

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether the Crow Tribe of Indians' right under an 1868 treaty to hunt on "unoccupied lands of the United States" survived Wyoming's admission to the Union.

2. Whether the establishment of a National Forest, in and of itself, renders the lands occupied within the meaning of the 1868 treaty with the Crow Tribe.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

STATEMENT

1. Three centuries ago, the Crow Tribe of Indians (Tribe) migrated from Canada to what is now southern Montana and northern Wyoming. See *Montana* v. *United States*, 450 U.S. 544, 547 (1981); Pet. 4. "In th[e] 19th century, warfare between the Crows and several other tribes led the tribes and the United States to sign the First Treaty of Fort Laramie of 1851, in which the signatory tribes acknowledged various designated lands as their respective territories." *Montana*, 450 U.S. at 547-548; see Treaty of Fort Laramie, Sept. 17, 1851, 11 Stat. 749; 2 Charles J. Kappler, *Indian Affairs:*

Laws and Treaties 594-595 (1904) (Kappler). That treaty "identified approximately 38.5 million acres as Crow territory." *Montana*, 450 U.S. at 548. It also specified that the tribes did "not surrender the privilege of hunting, fishing, or passing over any of the" designated lands. Kappler 595.

By the 1860s, non-Indians were rapidly settling the lands identified as Crow territory, building roads, driving away game, and taking possession of valuable mines. Institute for the Development of Indian Law, *Proceedings of the Great Peace Commission of 1867-1868*, at 86, 88, 90 (1975). Representatives of the United States, including the Commissioner of Indian Affairs, approached the Tribe with a proposal to "set apart a tract of your country as a home for yourselves and children forever, upon which your great Father will not permit the white man to trespass." *Id.* at 86. As for "the rest" of the Tribe's territory, the United States proposed to "buy * * * the right to use and settle [it]," while "leaving to" the Tribe "the right to hunt upon it as long as the game lasts." *Ibid.*; see *id.* at 90 ("You will still be free to hunt as you are now.").

The United States and the Tribe subsequently signed the Second Treaty of Fort Laramie of 1868. See Treaty Between the United States of America and the Crow Tribe of Indians (1868 Treaty), May 7, 1868, 15 Stat. 649; *Montana*, 450 U.S. at 548. That treaty "established a Crow Reservation of roughly 8 million acres," *Montana*, 450 U.S. at 548, in present-day Montana "for the absolute and undisturbed use and occupation of the [Tribe]," 1868 Treaty, art. II, 15 Stat. 650. In exchange, the Tribe agreed to cede the rest of its lands, including in present-day Wyoming, to the United States. *Ibid.* The 1868 Treaty expressly provided, however, that the

Tribe would retain certain rights in those ceded lands. In particular, Article IV specified that "they shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Ibid.*

2. Several months after the 1868 Treaty was signed, Congress created a temporary government for the territory of Wyoming. Act of July 25, 1868, ch. 235, 15 Stat. 178. In 1890, Congress passed an act admitting Wyoming to the Union "on an equal footing with the original States in all respects whatever." Act of July 10, 1890 (Statehood Act), ch. 664, 26 Stat. 222.

3. In 1891, Congress enacted a statute authorizing the President to "set apart and reserve" public lands as forest reservations. Act of Mar. 3, 1891, ch. 561, § 24, 26 Stat. 1103. Exercising that authority in 1897, President Grover Cleveland issued a proclamation "reserv[ing] from entry or settlement and set[ting] apart as a Public Reservation" certain forest areas in northern Wyoming. Proclamation No. 30, 29 Stat. 909-910 ("Warning is hereby expressly given to all persons not to enter or make settlement upon the tract of land reserved by this proclamation."). The public reservation encompassed lands bordering Montana, ceded by the Tribe in 1868 and adjacent to the Crow Reservation. Pet. 7. Known today as the Bighorn National Forest, the lands are to be administered "for the purpose of securing favorable conditions of water flows" and "furnish[ing] a continuous supply of timber." 16 U.S.C. 475. They also are to "be administered for outdoor recreation, range, * * * and wildlife and fish purposes." 16 U.S.C. 528.

4. In 1989, a member of the Tribe shot and killed an elk in the Bighorn National Forest. *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982, 985 (10th Cir. 1995), cert. denied, 517 U.S. 1221 (1996). After the State of Wyoming prosecuted the tribal member for hunting without a state license, *ibid.*, the Tribe sued Wyoming state officials in federal court, seeking a declaratory judgment that the Tribe and its members have a right under the 1868 Treaty to hunt on "unoccupied lands of the United States," art. IV, 15 Stat. 650, including National Forest lands. See *Repsis*, 73 F.3d at 986.

The Tenth Circuit affirmed the grant of summary judgment for the state officials, concluding that the right to hunt under the 1868 Treaty was "a temporary right which was repealed with Wyoming's admission into the Union." *Repsis*, 73 F.3d at 994; see *id.* at 992. That conclusion rested on this Court's decision in *Ward* v. *Race Horse*, 163 U.S. 504 (1896), involving a virtually identical provision of a treaty with the Bannock Indians. *Id.* at 507; see Treaty Between the United States of America and the Eastern Band of Shoshonees and the Bannack Tribe of Indians (Shoshone-Bannock Treaty), July 3, 1868, art. IV, 15 Stat. 674-675. In *Race Horse*, this Court held that the Bannock Indians' "right" under the treaty "to hunt on the unoccupied lands of the United States," art. IV, 15 Stat. 674, was repealed by what the Court perceived to be a conflict between the treaty and the Statehood Act and thus did not survive Wyoming's admission to the Union "on equal terms with the other States," 163 U.S. at 514. Finding *Race Horse* indistinguishable, the Tenth Circuit held that the Statehood Act likewise repealed the Tribe's treaty-based hunting right. *Repsis*, 73 F.3d at 988-989, 992, 994.

The Tenth Circuit also affirmed the grant of summary judgment on an "alternative basis," which the district court had not reached. *Repsis*, 73 F.3d at 993. Observing that the right to hunt under the 1868 Treaty extends only to "'unoccupied lands,'" the Tenth Circuit held that "since the creation of the national forest," "the lands of the Big Horn National Forest have been 'occupied.'" *Id.* at 994. The Tenth Circuit reasoned that when the 1868 Treaty was executed, "the lands located in what is now the Big Horn National Forest were unoccupied" because "they were open for settlement in the westward expansion of the United States." *Id.* at 993. But, the court continued, when the Bighorn National Forest was created—such that no one could "timber, mine, log, graze cattle, or homestead on the[] lands without federal permission"—the "lands were no longer available for settlement." *Ibid.* On this basis, the court concluded that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." *Ibid.*

Four years after the Tenth Circuit's decision in *Repsis*, this Court decided *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999). The issue in *Mille Lacs* was whether Minnesota's admission to the Union extinguished the Chippewa's rights to off-reservation hunting, fishing, and gathering under an 1837 treaty. *Id.* at 202; see *id.* at 175-176. In considering that question, the Court revisited *Race Horse* and determined that it had "rested on a false premise," *id.* at 204—namely, "that treaty rights are irreconcilable with state sovereignty," *id.* at 205. Rejecting that premise and other aspects of *Race Horse*'s reasoning, *id.* at 205-208, the Court held that the Chippewa's treaty rights survived Minnesota's statehood, *id.* at 202-203, 207-208.

5. Petitioner is a member of the Tribe who lives on the Crow Reservation in Montana. Pet. App. 5. In 2014, he and other members of the Tribe went hunting on the Reservation. *Ibid.* When the elk they were hunting crossed a fence and entered the Bighorn National Forest in Wyoming, petitioner and his companions followed. *Ibid.* There, on land ceded by the Tribe in 1868, they shot and killed three elk. *Ibid.* They then returned with the meat to the Reservation. *Ibid.*

The State of Wyoming cited petitioner for taking an antlered big-game animal during a closed season, and for being an accessory to others' doing the same—both misdemeanors under state law. Pet. App. 5. Petitioner pleaded not guilty and moved to dismiss the citations, contending that in taking the elk, he was exercising his right to hunt on unoccupied lands of the United States under the 1868 Treaty. *Id.* at 36-37.

The state trial court denied the motion to dismiss. Pet. App. 36-43. The court stated that it "agree[d]" with, and was "bound by," the Tenth Circuit's holding in *Repsis* that "Crow Tribe members do not have off-reservation treaty hunting rights anywhere within the state of Wyoming." *Id.* at 38. The court also stated that even "if [petitioner] had the off-reservation right to hunt, the state of Wyoming may regulate that right in the interest of conservation," *id.* at 39, and petitioner "is subject to th[ose] state regulations," *id.* at 40. Finding an evidentiary hearing unnecessary, *id.* at 37, the court canceled the hearing that had been scheduled, *id.* at 43.

Thereafter, a jury found petitioner guilty of both crimes charged. Pet. App. 9. Petitioner received a one-year suspended jail sentence and a three-year suspension of hunting privileges. *Ibid.* He was also ordered to pay $8080 in fines and costs. *Ibid.*

6. The Wyoming district court affirmed. Pet. App. 3-35.

The Wyoming district court concluded that petitioner was precluded under the doctrine of collateral estoppel from "attempting to relitigate the validity of the off-reservation treaty hunting right that was previously held to be invalid in the *Repsis* case." Pet. App. 31. Recognizing application of the doctrine to be a matter of federal law, *id.* at 12, the court found each of the prerequisites to issue preclusion satisfied, including that "the ultimate issue in the two cases is identical," *id.* at 13-14, and that petitioner is "in privity" with a party to the prior adjudication (namely, the Tribe), *id.* at 17. The court also rejected petitioner's contention that *Repsis* should be denied preclusive effect because *Mille Lacs* constituted "an intervening change in the applicable legal context." *Id.* at 20. In the court's view, "*Mille Lacs* did not change the fundamental legal principles applicable to the interpretation of treaties." *Id.* at 24.

The Wyoming district court further concluded that "[e]ven if collateral estoppel did not apply in this case, there are other grounds appearing in the record that support affirming the [trial] court's decision." Pet. App. 31. In particular, the Wyoming district court found that it was "appropriate" for the trial court to "adopt the analysis and conclusions" of the Tenth Circuit's decision in *Repsis*, *id.* at 34, which had held that the "Tribe's right to hunt * * * was repealed by the act admitting Wyoming into the Union" and that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land," *id.* at 33 (quoting *Repsis*, 73 F.3d at 992-993).

The Wyoming Supreme Court denied review. Pet. App. 1-2.

DISCUSSION

This case presents two important questions regarding the Tribe's right under the 1868 Treaty to hunt on "unoccupied lands of the United States": (1) whether that right survived Wyoming's statehood, and (2) whether National Forest lands may be considered "unoccupied." Art. IV, 15 Stat. 650. The Wyoming district court's decision, which answered both questions in the negative, is contrary to *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), and the decisions of other lower courts. Although the Wyoming district court relied in part on the doctrine of collateral estoppel, that doctrine poses no obstacle to review. The petition for a writ of certiorari should be granted.

A. The Decision Below Is Incorrect

In *Crow Tribe of Indians* v. *Repsis*, 73 F.3d 982 (1995), cert. denied, 517 U.S. 1221 (1996), the Tenth Circuit concluded (1) that the Tribe's hunting right under the 1868 Treaty was repealed by the Act of Congress admitting Wyoming to the Union, and (2) that National Forest lands are not "unoccupied" within the meaning of the Treaty. *Id.* at 994. The Wyoming district court in this case found it "appropriate" for the state trial court to "adopt" those "conclusions of the *Repsis* case." Pet. App. 34. Neither conclusion, however, is correct.

1. The Crow Tribe's hunting right under the 1868 Treaty survived Wyoming's admission to the Union

The 1868 Treaty did not provide for the termination of the Tribe's hunting right upon the admission of a State. Nor was that right repealed by Wyoming's Statehood Act.

a. The "starting point" for interpreting a treaty "is the treaty language itself." *Mille Lacs*, 526 U.S. at 206.

"The Treaty must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Ibid.*

Article IV of the 1868 Treaty provides that the Tribe "shall have the right to hunt on the unoccupied lands of the United States so long as game may be found thereon, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." 15 Stat. 650. The treaty itself thus "defines the circumstances under which the right[] would terminate," *Mille Lacs*, 526 U.S. at 207: (1) when "the hunting grounds" are no longer "unoccupied and owned by the United States," *ibid.*; (2) when "game" may no longer be "found thereon," 1868 Treaty, art. IV, 15 Stat. 650; or (3) when "peace" no longer "subsists among the whites and Indians on the borders of the hunting districts," *ibid.* Wyoming's admission to the Union is not one of those circumstances. The 1868 Treaty thus gives no indication that the right would terminate "when a State was established in the area." *Mille Lacs*, 526 U.S. at 207.

Nor is there any indication that Congress abrogated the Tribe's treaty rights in admitting Wyoming to the Union. "Congress may abrogate Indian treaty rights, but it must clearly express its intent to do so." *Mille Lacs*, 526 U.S. at 202 (citing *United States* v. *Dion*, 476 U.S. 734, 738-740 (1986)). Wyoming's Statehood Act provides: "[T]he State of Wyoming is hereby declared to be a State of the United States of America, and is hereby declared admitted into the Union on an equal footing with the original States in all respects whatever." 26 Stat. 222. That language "makes no mention of Indian treaty rights," and "it provides no clue that Congress considered the reserved rights of the [Tribe] and decided to abrogate those rights when it passed the

Act." *Mille Lacs*, 526 U.S. at 203. The Tribe's treaty rights therefore survived Wyoming's statehood.

b. *Ward* v. *Race Horse*, 163 U.S. 504 (1896), relied upon by the Tenth Circuit in *Repsis*, does not compel a different result in light of this Court's subsequent decision in *Mille Lacs*.

i. The Court in *Mille Lacs* described *Race Horse* as consisting of two "alternative" holdings. *Mille Lacs*, 526 U.S. at 206; see *id.* at 203-208. *Race Horse* first held that Wyoming's Statehood Act "repeal[ed]" the treaty right of the Bannock Indians to "hunt on unoccupied lands of the United States." 163 U.S. at 514. That holding rested on the premise that the treaty right was "irreconcilable" with the Statehood Act. *Ibid.* *Race Horse* noted that the Act admitted Wyoming to the Union "on equal terms with the other States." *Ibid.* And *Race Horse* stated that one of the powers enjoyed by "all the States" is the power "to regulate the killing of game within their borders." *Ibid.* *Race Horse* thus reasoned that if the Shoshone-Bannock Treaty "was so construed as to allow the Indians to * * * disregard and violate" Wyoming's hunting laws, *id.* at 511, Wyoming "will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union," *id.* at 514. *Race Horse* held that "the repeal" of the treaty right "result[ed] from th[at] conflict." *Ibid.*

Race Horse "alternative[ly]" held that "[t]he treaty rights at issue were not intended to survive Wyoming's statehood" in the first place. *Mille Lacs*, 526 U.S. at 206. *Race Horse* assumed that it would be "within the power of Congress" to create treaty rights that survived a State's "admission into the Union." 163 U.S. at 515. But *Race Horse* declined to construe the Shoshone-Bannock

Treaty as recognizing such a "perpetual right." *Ibid.* Noting that under the terms of the treaty itself, the hunting right would "cease whenever the United States parted merely with the title to any of its lands," *Race Horse* determined that the treaty should be construed as conveying only a "temporary and precarious" right, *ibid.*, which would not "conflict with" the Statehood Act or be "destructive of the rights of one of the States," *id.* at 516.

ii. This Court has since expressly repudiated *Race Horse*'s reasoning. As the Court in *Mille Lacs* explained, *Race Horse*'s "equal footing holding" rested on a "false premise." 526 U.S. at 204-205. Contrary to *Race Horse*, "an Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State." *Id.* at 204. "Rather, Indian treaty rights can coexist with state management of natural resources." *Ibid.* Given that the two are "reconcilable," "statehood by itself is insufficient to extinguish Indian treaty rights to hunt, fish, and gather on land within state boundaries." *Id.* at 205.

The Court in *Mille Lacs* also rejected the reasoning behind *Race Horse*'s alternative holding that the treaty rights at issue were not intended to continue past statehood. *Mille Lacs*, 526 U.S. at 206-207. That holding, the Court explained, was likewise informed by *Race Horse*'s erroneous conclusion that "the Indian treaty rights were inconsistent with state sovereignty over natural resources." *Id.* at 207-208. The Court also noted that *Race Horse* had viewed the "right to hunt on federal lands" as "temporary because Congress could terminate the right at any time by selling the lands." *Id.* at 207. But "[u]nder this line of reasoning," the Court

explained, "any right created by operation of federal law could be described as 'temporary and precarious,' because Congress could eliminate the right whenever it wished." *Ibid.* *Mille Lacs* thus rejected "the 'temporary and precarious' language in *Race Horse* [a]s too broad to be useful in distinguishing rights that survive statehood from those that do not." *Id.* at 206.

Mille Lacs instructs courts to focus instead on what the treaty "itself defines [as] the circumstances under which the rights would terminate." 526 U.S. at 207. And given that Wyoming's statehood is not one of those circumstances specified by the 1868 Treaty, see p. 9, *supra*, the Tenth Circuit in *Repsis*, as well as the courts below in this case, erred in holding that the Tribe's hunting right terminated upon Wyoming's admission to the Union.

2. The establishment of a National Forest, in and of itself, does not render the lands occupied within the meaning of the 1868 Treaty

Under the 1868 Treaty, the Tribe's hunting right extends only to "unoccupied lands of the United States." Art. IV, 15 Stat. 650. The Tenth Circuit in *Repsis* determined that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land" because the land could no longer be settled. 73 F.3d at 993. Under the 1868 Treaty, however, "unoccupied lands" refers to lands that have not actually been settled. Thus, the creation of the Bighorn National Forest, in and of itself, did not render those lands occupied.

a. Although the 1868 Treaty does not define the term "unoccupied lands," the text of the treaty indicates that the parties understood the term to mean lands not settled by "the whites." Art. IV, 15 Stat. 650. The text provides that "[t]he Indians * * * shall have the right to hunt on the unoccupied lands of the United States

* * * as long as peace subsists among the whites and Indians on the borders of the hunting districts." *Ibid.* The "borders of the hunting districts" thus mark not only where the Tribe may hunt; they also mark the line dividing "the whites and Indians." *Ibid.* It follows that as "the whites" settled more land, those "borders" would shrink and the land would become "[]occupied." *Ibid.* Conversely, as long as the land had not been settled, it would remain "unoccupied." *Ibid.*

The historical record supports that understanding of that term. During subsequent consideration of a bill to make appropriations to fulfill the United States' obligations under the 1868 Treaty, Senator Harlan reminded his colleagues that the Treaty permitted "the[] Indians to hunt, so long as they can do so without interfering with the settlements." Cong. Globe, 40th Cong., 3d Sess. 1348 (1869). Senator Harlan explained: "So long as outside lands, outside of the reservation, may not be occupied by settlements, and may be occupied by game, they may hunt the game." *Ibid.*

A representative of the United States echoed that interpretation during negotiations to secure further cessions of land from the Tribe. See Act of Mar. 3, 1873, ch. 321, 17 Stat. 626. Addressing members of the Tribe, the U.S. representative described the 1868 Treaty as allowing "the Crows" to hunt "where there are not too many whites." U.S. Office of Indian Affairs, *Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior for the Year 1873*, at 135 (1874); see *id.* at 132 (stating that the Treaty allowed "the Crows" to hunt "as long as there are any buffalo, and as long as the white men are not here * * * with farms"). The historical record thus indicates that the parties understood "unoccupied lands" to refer to lands

"the whites" had not settled. 1868 Treaty, art. IV, 15 Stat. 650.

b. Given that understanding, the fact that an area has been designated as a National Forest does not render that area occupied. Quite the opposite, the creation of the Bighorn National Forest meant that those "lands were no longer available for settlement." *Repsis*, 73 F.3d at 993. Indeed, the President's proclamation setting apart those lands "expressly" "[w]arn[ed]" "all persons not to * * * make settlement upon" them. Proclamation No. 30, 29 Stat. 910.

Moreover, hunting is not inherently incompatible with an area's designation as National Forest land. See 36 C.F.R. 261.8 (prohibiting hunting in National Forests only "to the extent Federal or State law is violated"). The U.S. Forest Service recognizes that certain tribes may have "off-reservation treaty rights," including "rights to hunt," on lands within the National Forest System. U.S. Forest Serv. (FS), U.S. Dep't of Agric. (USDA), *Forest Service Manual* § 1563.8b(1) (2016). And the Forest Service has committed to administering such lands "in a manner that protects Indian tribes' rights and interests in the resources reserved under the treaty." *Ibid.*; see, *e.g.*, FS, USDA, *Memorandum of Understanding Regarding Tribal-USDA-Forest Service Relations on National Forest Lands Within the Territories Ceded in Treaties of 1836, 1837, and 1842* (Mar. 2012), https://www.fs.fed.us/spf/tribalrelations/documents/agreements/mou_amd2012wAppendixes.pdf (providing a cooperative framework for the exercise of treaty-based hunting rights by the Lake Superior Chippewa Indians on National Forest lands).

This is not to say that the Forest Service would be barred from administering a particular tract of National Forest land in such a way that rendered it occupied within the meaning of the treaty. See *State* v. *Cutler*, 708 P.2d 853, 856 (Idaho 1985) (explaining that the "federal government is not necessarily foreclosed from using specific tracts of lands in such a manner that the signatory Indians to treaties would have understood the lands to be claimed, settled or occupied"). But the Tenth Circuit in *Repsis* concluded that the establishment of the Bighorn National Forest, by itself, rendered the land occupied, without considering the uses to which the Forest Service had put any particular tract. 73 F.3d at 993. And the courts below simply adopted that analysis, without considering the circumstances of this particular case. Pet. App. 34, 38; see *id.* at 37 (finding "[n]o evidentiary hearing" "warranted" because "[t]he decision on the matter of off-reservation treaty hunting rights is based in law and not in fact"). The decision below therefore rests on the mistaken legal conclusion that federal lands become "'occupied' simply by virtue of being declared a national forest." Pet. 21 (citation omitted).

B. The Questions Presented Have Generated Disagreement In The Lower Courts

1. This Court's review is warranted to resolve disagreement in the lower courts on both the continuing effect and scope of *Race Horse* and the meaning of "unoccupied lands." In cases involving the same treaty at issue in *Race Horse*—which, like the 1868 Treaty at issue here, reserves to "Indians * * * the right to hunt on the unoccupied lands of the United States," Shoshone-Bannock Treaty, art. IV, 15 Stat. 674—the Idaho Su-

preme Court and the Ninth Circuit have rendered decisions contrary to *Repsis* and the decision below. See *Shoshone-Bannock Tribes* v. *Fish & Game Comm'n*, 42 F.3d 1278 (9th Cir. 1994); *State* v. *Tinno*, 497 P.2d 1386 (Idaho 1972).

Even prior to *Mille Lacs*, the Idaho Supreme Court in *Tinno* concluded that "*Race Horse* and the theory it posited ha[d] been entirely discredited by the Supreme Court." 497 P.2d at 1392 n.6 (citing *Tulee* v. *Washington*, 315 U.S. 681 (1942), and *United States* v. *Winans*, 198 U.S. 371 (1905)).* The court in *Tinno* thus declined to allow the State to prosecute a tribal member for taking fish on the theory that the statute admitting Idaho to the Union "superseded" the Indians' treaty right. *Ibid.*; see *id.* at 1389-1390 (construing the hunting right to encompass fishing). The court also accepted the parties' stipulation that National Forest land was "unoccupied land of the United States," noting that "[a] plain reading of the treaty provision would lead to the conclusion that there is no serious geographical question presented." *Id.* at 1391; see also *Cutler*, 708 P.2d at 856 (explaining that the court in *Tinno* "agreed" that the "National Forest" land was "'unoccupied'").

The Ninth Circuit's decision in *Shoshone-Bannock* likewise conflicts with *Repsis* and the decision below. In that case, the Shoshone-Bannock Tribes sued an Idaho official under 42 U.S.C. 1983, seeking damages for an

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* The United States filed an amicus brief in *Tinno*, *supra* (No. 10737), arguing (at 19-20) that the theory of *Race Horse* had been repudiated by, *inter alia*, *Tulee* and *Winans*. *Tinno* was decided well before *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989), which admonished lower courts to "leav[e] to this Court the prerogative of overruling its own decisions." *Id.* at 484.

alleged violation of their right under the Shoshone-Bannock Treaty to "hunt on the unoccupied lands of the United States." 42 F.3d at 1280 (citation omitted). In considering whether the defendant was entitled to qualified immunity, the Ninth Circuit held that "[t]he Tribes' right is and was clearly established." *Id.* at 1286. Citing *Tinno*, the Ninth Circuit explained that "[f]or more than twenty years," the treaty "has been interpreted to reserve to the Tribes the right to fish on unoccupied lands of the United States." *Ibid.*

Thus, unlike *Repsis* and the decision below, the Idaho Supreme Court and the Ninth Circuit have continued to recognize a right to hunt on "unoccupied lands" following statehood, notwithstanding *Race Horse*. Because *Race Horse* is a decision of this Court, only this Court can definitively resolve questions concerning the continuing effect and scope of that decision. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989).

2. *Repsis* and the decision below are also in tension with the Montana Supreme Court's decision in *State* v. *Stasso*, 563 P.2d 562 (1977). That case involved a treaty that reserved to certain tribes "the privilege of hunting * * * upon open and unclaimed land." Treaty Between the United States and the Flathead, Kootenay, and Upper Pend d'Oreilles Indians, July 16, 1855, art. III, 12 Stat. 976. Although the language of that treaty differs from that of the 1868 Treaty here, the court in *Stasso* defined the term "open and unclaimed lands" to mean lands "'not settled and occupied by the whites.'" 563 P.2d at 565 (quoting *State* v. *Arthur*, 261 P.2d 135, 141 (Idaho 1953), cert. denied, 347 U.S. 937 (1954)). The court then concluded that the "National Forest lands" at issue in the case met that definition, implying that it viewed

those lands as "'not * * * occupied,'" despite their designation as National Forest. *Ibid.* (quoting *Arthur*, 261 P.2d at 141); see also *State* v. *Buchanan*, 978 P.2d 1070, 1076, 1082 (Wash. 1999) (en banc) (concluding that a state-owned wildlife area was "obviously unoccupied" and thus "open and unclaimed" within the meaning of a treaty with the Nooksack Indian Tribe), cert. denied, 528 U.S. 1154 (2000).

C. This Case Is A Suitable Vehicle For Resolving The Questions Presented

1. The State contends (Br. in Opp. 14-22) that petitioner is precluded from relitigating the issues in this case. That contention is unpersuasive.

a. In addition to holding that it was "appropriate" for the trial court to "adopt" the "conclusions" of the Tenth Circuit in *Repsis*, Pet. App. 34, the Wyoming district court concluded that petitioner was precluded from relitigating one of the issues the Tribe lost in that case: whether the Tribe's "off-reservation treaty hunting right" "was no longer valid" because "the right was intended to be temporary in nature," *id.* at 14. We may assume for present purposes that a civil judgment against a tribe in a suit seeking to establish rights under its treaty would ordinarily bind an individual tribal member in a criminal case. See *id.* at 15-18, 24-31. But in this case, the Wyoming district court's reliance on the doctrine of collateral estoppel was misplaced.

Collateral estoppel (or issue preclusion) "bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment.'" *Taylor* v. *Sturgell*, 553 U.S. 880, 892 (2008) (citation omitted). That rule, however, is not absolute. This Court has held that "even where the core requirements of issue preclusion are met, an

exception to the general rule may apply when a 'change in the applicable legal context' intervenes." *Bobby* v. *Bies*, 556 U.S. 825, 834 (2009) (brackets and citation omitted).

That exception applies here. In *Repsis*, the Tenth Circuit relied on *Race Horse* as "conclusively establish[ing] that 'the right to hunt on all unoccupied lands of the United States * * * ' reserved a temporary right which was repealed with Wyoming's admission into the Union." 73 F.3d at 994 (citation omitted). But after *Repsis* was decided, the "applicable legal context" changed. *Bobby*, 556 U.S. at 834 (citation omitted). As explained above, see pp. 11-12, *supra*, *Mille Lacs* expressly repudiated *Race Horse*'s conclusion that "treaty rights are irreconcilable with state sovereignty" and are thus "extinguish[ed]" upon statehood. *Mille Lacs*, 526 U.S. at 205. And contrary to the State's contention (Br. in Opp. 6-7, 20-21), *Mille Lacs* specifically rejected the line between "perpetual" and "temporary" rights that *Race Horse* relied upon in holding that the treaty rights at issue were not intended to survive Wyoming's admission to the Union. *Race Horse*, 163 U.S. at 515; see *Mille Lacs*, 526 U.S. at 206-207. *Mille Lacs* thus changed the applicable legal context with respect to both of *Race Horse*'s rationales. And because *Repsis* relied on *Race Horse* to conclude that the 1868 Treaty "reserved a temporary right which was repealed with Wyoming's admission into the Union," 73 F.3d at 994, that conclusion is not entitled to preclusive effect.

For that reason, issue preclusion should pose no barrier to this Court's review of whether the Tribe's treaty right survived Wyoming's statehood. In any event, the application of issue preclusion is "inextricably intertwined" with the merits of that question, for the continuing effect or scope of *Race Horse* is central to both.

Pet. Reply Br. 11. This case is thus an appropriate vehicle for review of that question.

b. The State also contends (Br. in Opp. 17-18) that issue preclusion poses an obstacle to this Court's review of whether the establishment of the Bighorn National Forest rendered the land occupied under the 1868 Treaty. That contention is likewise mistaken.

It is true that the Tenth Circuit in *Repsis* concluded that "the creation of the Big Horn National Forest resulted in the 'occupation' of the land." 73 F.3d at 993. But that was an "alternative basis for affirmance"; the federal district court in *Repsis* had "not reach[ed] th[e] issue" of whether "the lands of the Big Horn National Forest are 'occupied.'" *Ibid.* The only treaty-related question the federal district court addressed was whether the treaty right "was no longer valid" because "the right was intended to be temporary in nature." Pet. App. 14; see *Crow Tribe of Indians* v. *Repsis*, 866 F. Supp. 520, 522-524 (D. Wyo. 1994).

The Wyoming district court in this case recognized that issue preclusion may extend only to adjudications "necessary to the [prior] judgment," and it viewed the relevant "judgment" as that of the "federal district court" in *Repsis*. Pet. App. 14 (citation omitted). The Wyoming district court found "necessary to that judgment" the federal district court's determination that the treaty right "was intended to be temporary in nature." *Ibid.* But the Wyoming district court did not identify any other adjudication that was "necessary to the judgment." *Ibid.* (citation omitted). Thus, while the court affirmed the state trial court's adoption of the Tenth Circuit's alternative holding on the merits, *id.* at 33-34, it did not give the Tenth Circuit's alternative holding preclusive effect. Issue preclusion therefore would not

stand in the way of this Court's review of whether the establishment of the Bighorn National Forest rendered the land "unoccupied."

c. The State further errs in contending (Br. in Opp. 17-18) that this Court should not grant review of the questions presented because of the possibility of issue preclusion on a third issue the State argues was decided by the Tenth Circuit in *Repsis*, 73 F.3d at 993: whether enforcement of Wyoming's hunting laws against petitioner is "reasonable and necessary for conservation." The Wyoming district court did not address that issue, let alone resolve it on the basis of issue preclusion. Pet. App. 14 n.3, 25 n.7. As the court explained, the issue would arise only if petitioner has a "valid" treaty right, and here, the court concluded that he does not. *Id.* at 25 n.7. Should this Court grant review and reverse on the questions presented, whether the State can meet the demanding "'conservation necessity' standard" on the facts of this case could appropriately be considered on remand. *Mille Lacs*, 526 U.S. at 205.

2. Finally, the State argues (Br. in Opp. 22) that this case lacks a "proper record" for further review. The questions presented, however, are purely legal in nature. Indeed, the state trial court itself determined that an evidentiary hearing was unnecessary after resolving petitioner's motion to dismiss on legal grounds. Pet. App. 37. An evidentiary hearing on other issues—such as whether the Forest Service used the particular land at issue here in a manner that rendered it occupied, or whether the State's hunting laws are necessary for conservation—would be appropriate on remand if this Court were to reverse the decision below. But no further development of the record is necessary for this

Court to review the legal issues presented in the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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